# APPENDIX B

September 5, 2001

**TO:** Civil Practice Committee

**FROM:** Subcommittee of the Civil Practice Committee on the Discoverability of Experts' Draft Reports

**SUBJECT:** Report on the Discoverability of Experts' Draft Reports and Other Materials

The subcommittee was charged with the task of determining whether draft expert reports should be subject or not subject to disclosure? And, depending on the answer, whether the rules should be changed to reflect that determination? The subcommittee met on March 13, April 17, and July 12, 2001 to consider these questions.

Initially, the subcommittee determined that there were three (3) approaches to this issue:

1. Create a safe harbor which would prohibit the disclosure of draft expert reports.

2. Make clear that draft reports must be preserved and disclosed.

3. Leave the civil rules as they are and have these questions answered on a case-by-case basis.

## I. RECOMMENDATIONS

When the subcommittee presented its initial report to the Civil Practice Committee it was advised that the third alternative was not a satisfactory approach. At the April 17, 2001 meeting the subcommittee reached a consensus that:

1. A safe harbor from discovery should be created for

the preparation of expert reports including draft expert reports;.

2. The rules as they relate to the discovery of information used by or even considered by an expert should be amended to make clear that such information is subject to disclosure;

3. The discovery rule permitting the provision of an oral report through interrogatory answers in lieu of an expert's written report should be abolished; and

4. The content of an expert's written report should follow the general contours of **Fed.R.Civ.P.** 26 (a)(2).

In reaching this consensus, the subcommittee members took into consideration the fact that trial attorneys for over two (2) decades have to struggled over whether so-called "draft reports" are discoverable. Myriad practices have grown up to effectively minimize any discovery of the collaborative process between attorney and expert. In some instances, communications between the retaining attorney and the expert are oral. Often, a preliminary report is read to counsel and attorney comments are considered prior to the report's reduction to final form. In some instances an attorney may examine a draft report on the expert's computer screen and make comments on the spot. In other instances, counsel receives an unsigned draft report from the expert and, in turn, discusses the contents with the expert or provides written comments. The collective experience of the subcommittee is that such "draft reports" are rarely, if ever, preserved.

The subcommittee believes that the desirability of the retaining attorney and expert discussing the contents and format of an expert's report substantially outweighs the potential loss of information which might have been used to attack an expert's credibility and particularly his or her independence. After all, the value of any expert's opinion is based on the facts assessed and/or assumed and the reasoning process used to analyze them. Too much time is now spent in discovery with little benefit gained in examining the report preparation process. In the subcommittee's view, a bright line standard reflected in this safe harbor recommendation should

simplify discovery, streamline judicial review, and focus the cross-examination on the veracity of an expert's opinion rather than the attorney's role in the production of the final report.

The subcommittee met again on July 12, 2001 to discuss ways to implement its recommendations and to determine what approaches to this problem had been tried either by federal or state courts. Research disclosed some discussion of these issues at the federal level but virtually none at the state level. It is likely that since most state systems model or at least resemble the federal system, the case law developed by the federal courts has served as a template for resolving discovery issues at the state level.

This report will first discuss the competing philosophies articulated by the federal courts on this issue. Secondly, the report proposes that New Jersey amend ***R***. 4:10-2(d)(1) and ***R***. 4:17-4 to give effect to the subcommittee's recommendations.

## II. BACKGROUND

There are two competing philosophies regarding attorney work product and draft expert reports which have emerged, particularly in federal case law interpreting **Fed. R. Civ. P.** 26 (a)(2) and its predecessor. The first is exemplified by *Bogosian v. Gulf Oil Corp*., 738 F.2d 587 (3d Cir. 1984). There, the Third Circuit considered the applicability of the attorney work product doctrine to materials an attorney provided to an expert in an antitrust class action. The materials included 115 documents alleged to contain both "fact" and "opinion" attorney work product. The Court of Appeals reversed a trial court's direction that all work product materials shown to the testifying expert should be disclosed. In doing so, the court stressed the interaction of then existing **Fed. R. Civ. P.** 26(b)(3) & (4) on attorney work product issues.[1] **Fed. R. Civ. P.** 26(b)(3) does permit discovery of testifying experts "subject

[1] Fed. R. Civ. P. 26(b)(3) provides:

> Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a

to the provisions of.... [**Fed. R. Civ. P.** 26(b)(4)]...." **Fed. R. Civ. P.** 26(b)(4) at that time permitted the discovery through interrogatories of facts known and opinions held by testifying experts. According to the Third Circuit, when these two (2) sub-parts of **Fed. R. Civ. P.** 26 are read together, the provision in **Fed. R. Civ. P.** 26(b)(3) which requires a court to "....protect against disclosure of the mental impressions, conclusions, opinions or legal theories of ....[the] attorney", trumps the disclosure requirements of **Fed. R. Civ. P.** 26(b)(4). *Id.* at 595. Mental impressions of the lawyer– so-called "opinion" work product – cannot be discovered, according to the Third Circuit, even when provided to a testifying expert by the attorney that had retained him or her.

The Third Circuit reinforced its rule construction analysis with a policy observation that has force today:

> Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory. Even if examination into the lawyer's role is permissible, an issue not before us, the marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong public policy against the disclosure of documents consisting of core attorney's work product.

*Bogosian*, 738 F.2d at 595. Many courts have embraced the reasoning of the *Bogosian* Court and have denied discovery of so-called "opinion" work product in similar circumstances. *See Toledo Edison Co. v. GA Techs., Inc.*, 847 F.2d 335, 340

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> showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative or a party concerning the litigation.

(6th Cir. 1988); *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 282-283 (D. Kan. 1989); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 108 F.R.D. 283, 286 (M.D.N.C. 1985).

The other philosophy is exemplified by *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 393-384 (N.D.Cal. 1991). That court acknowledged that communications between an attorney and an expert might well accelerate an expert's ...."learning". However, the court warned that this "learning" might be obtained "... at an extremely high price."

> What obviously is threatened by such communications is the independence of the expert's thinking, both her analysis and her conclusions. The risk is that the lawyer will do the thinking for the expert, or, more subtly, that the expert will be influenced, perhaps appreciably, by the way the lawyer presents or discusses the information. These risks would be eliminated if only the data were presented to the expert. The risk would be reduced, arguably considerably, if it were known that all communications from counsel that accompany the transmission of data (and that are relevant to the matters about which the expert will testify) would be reviewable by other experts (retained by opposing parties or appointed by the court) and made known to the trier of fact.

*Intermedics,* 139 F.R.D. at 394.

The *Intermedics* Court determined that except in unusual circumstances all information provided to an expert by the attorney whether "opinion" work product or otherwise, should be produced to the litigation adversary. Other courts have agreed with the rationale for discovery expressed in *Intermedics*. *See U.S. Energy Corp. v. NUKEM, Inc.*, 163 F.R.D. 344, 348 (D. Colo. 1995)(decided under pre-1993 Rule 26); *United States v. City of Torrance*, 163 F.R.D. 590, 593 (C.D. Cal. 1995)(same); *William Penn Life Assur. Co. of Am.v. Brown Transfer & Storage Co.*, 141 F.R.D. 142, 143 (W.D. Mo. 1990); *Boring v. Keller*, 97 F.R.D. 404, 407 (D. Colo. 1983).

In 1993 the Federal Rules of Civil Procedure were amended, among other things, to require the provision of expert reports and to permit depositions of experts

as a matter of right in federal cases. **Fed. R. Civ. P.** 26 (a)(2)(B), in relevant part, now provides:

> ... [required disclosure of experts] with respect to a witness who is retained or specially employed to provide expert testimony in the case ... [shall] be accompanied by a written report prepared and signed by the witness. *The* report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information *considered by the witness in forming the opinions* ...

A number of courts have argued that the 1993 revision of **Fed. R. Civ. P.** 26 has changed the dynamics of discovery. Those courts have found it significant that **Fed. R. Civ. P.** 26 (a)(2)(B) now requires the production of information *considered* rather than simply the facts and data relied upon and have concluded that the Rule now embraces "opinion" work product provided by an attorney to an expert. *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F. 3d 1370, 1374 (Fed. Cir. 2001) (Applying Eighth Circuit case law); TV-3, Inc. v. Royal Ins. Co. of America, 194 F.R.D. 585, 587-588 (S.D. Miss. 2000); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 171 F.R.D. 57, 66 (S.D.N.Y. 1997); *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 639 (N.D. Ind. 1996). But an equal number of federal courts have rejected this conclusion and have continued to support the protection of "opinion" attorney work product. *The Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 9 (D. Mass. 1999); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642-643 (E.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-295 (W.D. Mich. 1995); *All West Pet Supply Co. v. Hill's Pet Prod.*, 152 F.R.D. 634, 638 (D. Kan. 1993).[2]

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[2] In All West Pet Supply, 152 F.R.D. at 638-639, for example, the court endorsed the discovery philosophy espoused by Bogosian, finding that:

> the defendants in this case has (sic) demonstrated little more than a speculative need for the documents. At most, the defendants contend that the attorney's work product shaped the expert's opinion on the plaintiff's damages in this case. This is not a sufficient showing to overcome the strong policy against disclosure of opinion work product.

Like the general debate on "opinion" attorney work product, the federal courts disagree about the discoverability of draft expert reports. Compare *Krisa v. The Equitable Life Assur. Soc.*, 196 F.R.D. 254, 256-257 (M.D. Pa. 2000)(directing production of draft reports); *B.C.F. Oil Refining*, 171 F.R.D. at 62 (same); *County of Suffolk v. Long Island Lighting Co.*, 122 F.R.D. 120, 122 (E.D.N.Y. 1997) ("courts have defined the scope of ... [**Fed. R. Civ. P.** 26 (b) (4)] to allow 'disclosure of drafts of reports or memoranda experts have generated as they develop the opinions they will present at trial.'"); *Hewlett-Packard Company v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 536-537 (N.D. Cal. 1987)(draft reports prepared in advance of submission of report filed with the Patent and Trademark Office were discoverable); *Quadrini v. Sikorsky Aircraft*, 74 F.R.D. 594 (D. Conn 1977) (draft expert reports discoverable), with *The Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. at 10-11 (draft expert reports not discoverable because they are a type of opinion work product); *Moore v. R.J. Reynolds Tobacco, Co.*, 194 F.R.D. at 662 (same). While there is disagreement as to whether draft expert reports are discoverable, a majority of the federal courts considering this question have found that they are.

Courts that have directed the production of draft expert reports have done so because **Fed. R. Civ. P.** 26 (a)(2)(B) requires the production of "the data or other information considered by ..." an expert in forming his or her opinions. Prior to 1993, **Fed. R. Civ. P.** 26 (b)(4) also provided for discovery of facts relied upon in expressing opinions. As the Advisory Committee Note to the 1970 Amendments to Rule 26 (b)(4) of the Federal Rules of Civil Procedure notes:

> These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert. They also reject as ill-considered the decisions which have sought to bring expert information within the work product doctrine.

**Fed. R. Civ. P.** 26 (b)(4) advisory committee's note (*citing American Oil Co. v. Pennsylvania Petroleum Products Co.*, 23 F.R.D. 680, 685-686 (D.R.I. 1959); *United States v. McKay*, 372 F.2d 174, 176-177 (5th Cir. 1967)).

Thus the structure of and commentary to the old **Fed. R. Civ. P.** 26 (b)(4) suggested "that documents prepared by expert witnesses are not within the ambit of

the work product doctrine." *Krisa*, 196 F.R.D. at 256. Courts also have reasoned that the policy favoring protection from discovery of opinions held by non-testifying experts do not apply to an expert expected to testify at trial. *Krisa* at 256; *B.C.F. Oil Refining,* 171 F.R.D. at 62. Finally, courts have favored such production where technical issues make pretrial preparation particularly important. *Hewlett-Packard*, 139 F.R.D. at 537.

The cases that have denied discovery of draft expert reports have based their decisions on the need to encourage a close and collaborative effort between the expert and the retaining attorney. *See Nexxus Products*, 188 F.R.D. at 10-11. Moreover, those courts believe that a blanket rule requiring disclosure of such draft reports puts too prominent a focus on the mechanics of the production of an expert's report rather than focusing on the basis of the expert's opinion. *All West Pet Supply*, 152 F.R.D. at 638 n.6.

These courts have common sense on their side. Experts familiar with the litigation process usually destroy their draft reports in the ordinary cause of the report preparation process and the rules do not forbid this. Thus, draft reports usually are available only from the unwary or careless expert or in odd circumstances.

There are important policies which are furthered where a discovery regime permits attorneys to shield communications with their retained experts when the attorneys are not merely conveying facts and/or data for the experts to "consider" in forming their opinions. *The Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. at 11. Litigation is expensive. Attorneys, by focusing an expert's attention on the significant issues in the case, unquestionably can improve the expert's learning curve and lessen litigation costs. *Krisa,* 196 F.R.D. at 259. It is common knowledge that attorneys regularly work with their retained experts in preparing expert reports. It is good practice as well. *Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. at 662 n.3 (the court quoted the Advisory Committee's Note to Fed. R. Civ. P. 26 (a)(2)(b) stating that counsel could assist an expert in preparing his or her report). See Note, Christa L. Klopfenstein, *Discoverability of Opinion Work Product Materials Provided to Testifying Experts*, 32 Ind. L. Rev. 481, 503 (1999). Too much scrutiny of this collaborative process serves only to demonize the natural communicative process between an attorney and his or her retained expert. Ultimately, it does little to

insure that the expert's opinion has been independently derived.[3] As the court in *Nexxus Products*, 188 F.R.D. at 10, aptly observed:

> The central inquiry on cross examination of an expert witness.... is not the question of if and to what extent the expert was influenced by counsel; rather it is this: what is the basis of the expert's opinion. Cross examination on the adequacy and reliability of the stated basis of the expert's opinion can be conducted effectively absent a line of questioning on counsel's role in assisting the expert.

*See also All West Pet Supply*, 152 F.R.D. at 638 n.6.

## III. IMPLEMENTATION

Our recommendations, if adopted, will place New Jersey with those courts which have concluded that the benefits of attorney and expert witness collaboration outweigh the marginal benefits obtained where full disclosure of expert draft reports and attorney opinion work product are required.

The subcommittee suggests that ***R.*** 4:10-2(d)(1) be amended to provide:

> (d) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of ***R.*** 4:10-2(a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as

[3] Of course one can find rare but nonetheless serious abuses reported in the cases. In Occulto v. Amadar of New Jersey, Inc., 125 F.R.D. 611, 616-617 (D.N.J. 1989), for example, the court directed disclosure of a draft report which had been written entirely by the attorney as well as a cover letter directing the expert to type the draft report on his letterhead. The court there found that the draft was nothing more than factual material which should be available to the factfinder. The court also noted that the draft had particular relevance because when it was initially discovered at a deposition of the expert, the attorney initially denied having any role in the report's authorship. While this abuse should not be condoned, the attorney may well have accomplished the same result, following current practice, without prejudice to his client's interests, by discussing his theories with the expert and leaving it to the expert to form his own opinions and defend them on cross-examination.

follows:

> (1) A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness, including a treating physician who is expected to testify and of an expert who has conducted an examination pursuant to ***R.*** 4:19 whether or not that person is expected to testify, [~~to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion,~~] and to furnish, as provided by ***R***.4:17-4(b), a copy of the report of an expert witness, including a treating physician, and, whether or not that person is expected to testify, of an expert who has conducted an examination pursuant to ***R.*** 4:19 or to whom a party making a claim for personal injury has voluntarily submitted for examination without court order. *Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert's report is limited to facts and/or data considered by the expert in rendering the report. All other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process shall be deemed trial preparation materials discoverable only as provided in subsection "(c)" above.*

The subcommittee also suggests that ***R.*** 4:17-4(e) be amended to provide:

> (e) Expert's or Treating Physician's Names and Reports. If an interrogatory requires a copy of the report of an expert witness or a treating physician, the answering party shall, subject to be provisions of ***R.*** 4:10-2(d)(1), annex to the interrogatory an exact copy of the [~~entire~~] report or reports rendered by the expert or treating physician [~~or a complete~~

~~summary of any oral report.~~] *The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.* [~~The answering party shall further certify to not knowing of the existence of other reports of that expert or treating physician, either written or oral, and if such become later known or available, they shall be served promptly o the propounding party, but in no case later than the time provided by **R.** 4:17-7.~~] If the answer to an interrogatory requesting the name and report of the party's expert or treating physician indicates that the same will be supplied thereafter, the propounder may, on notice, move for an order of the court fixing a day certain for the furnishing of that information by the answering party. Such order may further provide that an expert or treating physician whose name or report is not so furnished shall not be permitted to testify at trial.

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